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SUBJECT: POST-ELECTION VIOLENCE COMMISSION RELEASES REPORT

REF: A. NAIROBI 2266
[1](#)B. NAIROBI 1378
[1](#)C. NAIROBI 1170

SUMMARY

[1](#)1. (U) The Commission of Inquiry into Post-Election Violence (CIPEV) submitted its report to President Mwai Kibaki and Prime Minister Raila Odinga on October 15 (Ref A). The report proposes the establishment of a special tribunal to try high-level organizers of post-election violence. It also proposes comprehensive reform of the Kenya Police Service and Administration Police, including their merger. CIPEV found sufficient evidence to charge ten high-level organizers of post-election violence. Justice Philip Waki, the chairman of the commission, briefed the local diplomatic community on October 16 on the report and emphasized that the international community had an important role in keeping pressure on the government to ensure implementation. He noted that Kibaki and Odinga promised to implement the report's proposals, but expressed fear that, like prior commissions of inquiry, CIPEV's proposals could be undermined by Kenya's culture of impunity. He and the other Commissioners also appealed to the international community to finance the initiatives contained in the report.

[1](#)2. (U) CIPEV presented its report to Kofi Annan on October 17, along with the names of the ten high-level organizers of post-election violence. Annan has agreed to deliver the names of the accused to the International Criminal Court (ICC) if sufficient steps are not taken to ensure accountability. CIPEV's recommendations provide a solid foundation for Kenya to begin to address issues of accountability and to undertake much-needed police reform. We will weigh in as necessary to ensure that its proposals are implemented and will consider providing assistance, if requested. End Summary.

THE COMMISSION

[1](#)3. (U) The so-called Waki Commission, or Commission of Inquiry into Post-Election Violence (CIPEV), was formed as part of the Kofi Annan-led mediation process which brought an end to Kenya's post-election crisis. CIPEV was mandated to make findings of fact related to post-election violence, to

recommend measures to prevent future violence, and to propose legal actions against those found guilty of organizing or perpetrating acts of post-election violence (Ref C). As a commission of inquiry, all those providing evidence did so under oath. CIPEV functioned on an adversarial basis, with those providing evidence entitled to legal representation and subject to cross-examination (Ref C).

ACCOUNTABILITY -- A SPECIAL TRIBUNAL

14. (U) The CIPEV submitted its report to President Mwai Kabaki and Prime Minister Raila Odinga on October 15; the following day CIPEV Commissions and the Commission Secretary briefed the diplomatic community on the report and its findings. The underlying assumption of the report is that Kenya's criminal justice system is capable of trying low-level perpetrators, but it is neither capable nor willing to hold high-level figures accountable. Therefore, CIPEV focused its investigative efforts on high-level organizers and financiers of post-election violence, individuals heretofore considered above the law and effectively protected by Kenya's so-called "culture of impunity." The key CIPEV recommendation is the establishment of an internationally supported tribunal that will enforce the law and ensure accountability; the recommended mechanism would be independent of Kenya's judicial and police investigation authorities, which have largely shown themselves incapable or unwilling to hold powerful figures accountable.

NAIROBI 00002401 002 OF 004

15. (U) The Special Tribunal for Kenya (the Tribunal), as recommended by CIPEV, would try high-level organizers of post-election violence, and be based on a constitutional amendment. CIPEV considers the constitutional amendment necessary to head off constitutional challenges -- which have been used to delay or overturn previous attempts to prosecute powerful persons. The Tribunal would have its own investigative and prosecutorial capacity, its own public defenders office, trial chamber and appeals chamber, and the ability to protect witnesses. Waki stated that, while Kenyans would head the three-member Trial and Appeals Chamber, the Special Tribunal needs a significant international component to give it credibility. The CIPEV report proposes that each Chamber include two judges from Commonwealth states. It also suggests that the investigative branch be headed by an international. The presence of international investigators would greatly increase public willingness to come forward, Waki believes.

16. (U) In the course of its investigation, CIPEV gathered evidence it believed sufficient to raise charges against ten politically well-connected persons (Septel), according to Waki. Waki did not exclude the possibility that charges could be raised against additional individuals, but he said further investigations would be needed to do so. CIPEV decided not to release the names of the ten individuals or make public the evidence against them. Releasing these names would divert public discussion from the substance of the report, according to Waki. Waki stated that he expects the President and Cabinet to approve the proposal to establish the Tribunal soon and submit the proposal to parliament. Parliament will then adopt the constitutional amendment and enabling legislation on its own timeline, after which the President would assent. The Tribunal could be stood up within 45 days from the Act coming into force. Waki hoped that the Tribunal could be stood up in about four to five months.

ROLE OF STATE SECURITY AGENCIES

17. (U) In the briefing for the diplomatic community,

Commissioner Gavin McFadyen, a former Deputy Commander of the New Zealand national police force, stated that there was lack of coordination among the National Security and Intelligence Service (NSIS), the Kenya Police Service (KPS), and the Administration Police (AP). Specifically, the NSIS had some very good advance information about preparations to undertake post-election violence, but the police services did not act on the information, according to McFadyen. He concluded that the NSIS performed its information gathering function well, but expressed "grave reservations" about some NSIS activities in the run-up to, and the aftermath of, the elections. McFadyen particularly criticized the NSIS attempt to obtain election observation accreditation for 55 of its officers, terming it an illegitimate attempt to influence the election's outcome.

POLICE REFORM NEEDED

18. (U) The CIPEV report describes the KPS and AP as poorly prepared for the elections. It blames the KPS and AP leadership for the scale of the violence, and concludes that the violence could have been much better contained had the police acted and planned in accordance with the information known in advance. According to McFadyen, CIPEV took evidence of innumerable instances where police officers acted bravely and attempted to stop the violence. However, the police were overwhelmed by the scale of the violence. Still, there were instances when police either did nothing to stop or actively assisted in acts of post-election violence. Additionally, CIPEV took evidence on 405 deaths caused by police shootings. McFadyen concluded that many police shootings could not be explained legally or operationally. McFadyen was particularly critical of the behavior of the AP. He stated that the AP top leadership acted "nefariously and contrary to law," especially in sending 1,600 AP officers to act as PNU

NAIROBI 00002401 003 OF 004

polling observers in the opposition stronghold of Nyanza Province. McFadyen noted that the AP was too closely identified with local authorities, which hampered its credibility with the Kenyan people.

19. (U) CIPEV recommends a series of concrete reforms for KPS and AP, including a thorough review and revision of tactics and use of force doctrine employed by Kenyan police, the creation of a modern Code of Conduct, and a complete revision of the Police Act. The report also recommends that a professional police officer head the Kenyan police service. (Note: Police Commissioner Hussein Ali is a career military officer. End Note). In its most sweeping proposal, CIPEV proposes merging the AP and KPS. McFadyen acknowledged the difficulties of merging distinct institutions with unique cultures, but stated that, "sometimes the hard work is worthwhile." CIPEV also proposes the establishment of a Police Reform Group, headed by an international with experience in police reform, to undertake a four month top-to-bottom review to suggest necessary further reforms. The report also advises the establishment of a police ombudsmen's office, which would be authorized to review current complaints and disciplinary processes within the KPS and would have the power to hear and investigate public complaints against the police.

GENDER-BASED VIOLENCE HIGHLIGHTED

110. (U) CIPEV made a significant effort to address gender-based violence (GBV) in its investigation (Ref B). George Kegoro, the Secretary to CIPEV, told Poloff that CIPEV established partnerships with prominent NGOs around the country, especially the Kenyan Federation of Women Lawyers (FIDA). FIDA provided lawyers to take "in camera" testimony of survivors of GBV. The CIPEV report concludes that most

victims of GBV were poor women, although some men also experience GBV, and that sexual violence was generally ethnically motivated. Most persons who came forward to testify had been gang-raped. The report alleges that a significant number of perpetrators of GBV were members of police forces. It also says that police were not prepared to treat GBV as seriously as other types of crime. Individuals testified that police often refused to take reports of GBV, although others testified that some police assisted victims of violence to obtain medical assistance. The report concludes that it is necessary to educate and train police services to take GBV seriously. The report proposes the establishment of a Rapporteur on Sexual Violence to advise police on GBV. The report also recommends compensation to victims of GBV.

¶11. (SBU) Comment: Commissioner Ali responded on October 17 to the report's damning conclusions related to police treatment of GBV by announcing the formation of a panel of 20 female officers to re-examine cases of GBV with the intent to bring charges against perpetrators. However, it is very difficult to prosecute GBV cases without fresh evidence. Ali's move appears to be more an effort at damage control than a commitment to treat GBV seriously. End Comment

KOFI ANNAN RECEIVES REPORT

¶12. (U) Kofi Annan traveled to Nairobi and received the CIPEV report on October 17. CIPEV and Annan agreed that CIPEV would give him the names of the ten people and evidence against them. If, at an indeterminate future date, it was clear that either the Tribunal would not be created or that it was being subverted, Annan is to submit the names and evidence to the International Criminal Court (ICC) for investigation and possible prosecution. Last week, the Special Prosecutor of the ICC was quoted in the press as stating that investigating the events in Kenya remains a priority.

COMMENT

NAIROBI 00002401 004 OF 004

¶13. (SBU) CIPEV's efforts to get at the heart of the post-election violence are laudable, especially given the short mandate and limited resources at its disposal (Ref B). Its proposals provide a solid foundation for Kenya to begin to address issues of accountability and to undertake much-needed police reform. The report puts police leadership under pressure and could provide impetus for President Kibaki to reconsider his support for Commissioner Ali. Thus far President Kibaki and Prime Minister Odinga have given positive signals regarding implementation of the reports conclusions. In addition, influential political figures on both sides of the grand coalition have publicly urged action against those implicated in post-election violence. Kenyan public opinion has also been overwhelmingly positive, demonstrating once again that Kenyans want to ensure that conflict such as the post-election violence does not recur. However, the culture of impunity in Kenya remains strong and the CIPEV proposals provide ample opportunity to those who might want to scuttle the strong measures proposed. Post will continue to support implementation of the report's proposals, and will consider providing appropriate assistance, if requested.
RANNEBERGER